

N.D.A.G. Letter to Mehrer (Dec. 8, 1989)

December 8, 1989

Mr. Owen Mehrer
Stark County State's Attorney
P.O. Box 130
Dickinson, ND 58601

Dear Mr. Mehrer:

Thank you for your December 1, 1989, letter in which you have inquired as to whether N.D.C.C. §§ 31-01-16 and 31-01-18 authorize a district judge to issue an order authorizing payment of expert witness fees in a specified amount.

N.D.C.C. § 31-01-16 provides:

31-01-16. Compensation and mileage and travel expense of witness
- County to pay fees except for district court fees in criminal action. A witness in a civil or criminal case is entitled to receive:

1. A sum of twenty-five dollars for each day necessarily in attendance before the district or county court or before any other court, board, or tribunal, except municipal court.
2. A sum for mileage and travel expense reimbursement equal to the reimbursement rates provided for state employees in sections 44-08-04 and 54-06-09.

In all criminal cases such witness fees and expenses on the part of the state must be paid out of the county treasury of the proper county except that in district court cases the attorney general shall pay prosecution witness fees and expenses, and the supreme court shall pay other witness fees for indigents and expenses. Prisoners may not be compensated as witnesses under this section.

A witness is entitled, under this section, to receive the sum of \$25.00 for each day necessarily in attendance before a court, board, or tribunal, except municipal court, and a mileage and travel expense reimbursement equal to that payable to state employees pursuant to N.D.C.C. §§ 44-08-04 and 54-06-09. A witness is statutorily entitled to this witness fee and mileage and travel expense reimbursement. No court order is required for such payments.

N.D.C.C. 31-01-18 provides:

31-01-18. Expenses of witness paid by city, county, or state upon court order in criminal or municipal court action. When a person, as a witness in a criminal or municipal court action, appears before a magistrate, grand jury, or court, upon a subpoena or in pursuance of an undertaking and it appears that the person:

1. Has come from a place outside the county; or
2. Is poor and unable to pay the expenses of such attendance,

the court, if the attendance of the witness is upon a trial, by order upon its minutes, or in any other case, the judge, by a written order, may direct the state in district court cases, the county in county court cases, or the city in municipal court cases to pay the witness a reasonable sum to be specified in the order for the necessary expenses of the witness's attendance. Upon the production of the order or a certified copy thereof, the state, county, or city, to whichever entity the order is directed, must pay the witness the sum specified. In district court cases, the attorney general shall pay prosecution witness expenses and the supreme court shall pay other expenses.

This section permits a court, in criminal or municipal court actions, to pay a reasonable sum for the necessary expense of a witness who appears before a magistrate, grand jury, or court upon a subpoena or pursuant to an undertaking.

Absent a specific statute requiring a sum to be paid to a witness, payment of an amount in excess of that authorized by N.D.C.C. § 31-01-16 for the attendance of that witness must be authorized by court order pursuant to N.D.C.C. § 31-01-18. Payment for the increased witness expenses will be made by the appropriate entity upon the production of the order or a certified copy of the order authorized by N.D.C.C. § 31-01-18. The express language of N.D.C.C. § 31-01-18 requires that the order authorize the payment of "a reasonable sum to be specified in the order for the necessary expenses of the witness's attendance". The entity, upon receipt of the order or a certified copy thereof, will pay the witness the "sum specified".

Based upon the express language of N.D.C.C. § 31-01-18, any witness expenses to be paid in excess of the amounts authorized by N.D.C.C. § 31-01-16, must be set forth in the order.

As you are aware, payment of fees and expenses under either N.D.C.C. §§ 31-01-16 and 31-01-18 are subject to legislative appropriation. Once that appropriation has been expended, no further funds are available for payment of these fees and expenses absent emergency commission authorization. Since these funds are appropriated to this office by the Legislative Assembly, we must account for the expenditure of these funds and provide verification that such funds were spent in accordance with law. Receipt of an order or certified copy of that order authorizing an expenditure of witness fees and expenses in criminal and municipal court actions in excess of that authorized by N.D.C.C. § 31-01-16

is necessary for this office to comply with fund accountability requirements imposed by law and audit examiners.

I trust that I have adequately responded to your inquiry.

Sincerely,

Nicholas J. Spaeth

vkk